chased by all of them, and P.W. 3, who said that he was present at the scene as an innocent bystander, saw only two persons chasing P.W. 2. There are other contradictions in the evidence, but in our view they were of a minor nature in the face of the main question as to who were the assailants. The learned judge did not in his summing-up itemise these discrepancies, but he did warn the jury that, if they considered the discrepancies were serious, then they must reject the evidence of the witnesses concerned. The impression made on the jury by the pauses, hesitations and demeanour of the witnesses when giving evidence in court may be totally different from the impression made on us by the cold print of the appeal record. Five members of the jury preferred the evidence of P.W. 2 and P.W. 3 to that given by the appellants and their witnesses. They were entitled to do so, and there was evidence, if believed, to justify their verdict of guilty.

Mr. Ong Eng Kek (D.W. 5) was called in support of the second appellant's case. Mr. Ong was *ketua* of the village. Dato' Jeyaratnam complained that the learned judge in his summing-up expressly referred to the fact that Mr. Ong in cross-examination admitted that he did not give any statement to the police and thereby invited the jury to draw an adverse inference. We are of the opinion that this passage in the summing-up was pure reportage. Again and again throughout his summing-up the learned judge emphasised to the jury that matters of fact were entirely for them to consider.

Dato' Jeyaratnam submitted that the learned judge was wrong in directing the jury that the investigation officer had not been cross-examined by the defence as to whether he went to the place in front of Mr. Ong's shop to find out whether or not there was any blood there and in inviting the jury, since the investigation officer did not notice the presence of patches of blood there, to draw an inference adverse to the defence. The defence case in the lower court was that the deceased, on being stabbed, could not have fallen dead at or near the scene, but that he had sufficient life to run some distance to die in front of Mr. Ong's house. It was obvious from the verdict of the jury that they did not regard it as important where the deceased dropped dead. Moreover, A.S.P. de Silva gave evidence to say that he found a small pool of blood on the floor of the temple, which was not very far from the bench where the deceased was stabbed.

Dato' Jeyaratnam's next complaint is this. Both appellants gave evidence on oath. The first appellant's defence was that, though he was present at the *wayang*, he was an innocent bystander and took no part in the stabbing. He called a witness, D.W. 2, in support of his case. D.W. 2 had earlier made a statement to the police, as confirmed by the investigation officer. If his evidence was different from his statement to the police, he could have been cross-examined on it, but that was not done, which shows (it was submitted) that his credit had not been impeached: Dato' Jeyaratnam argued that the failure of the learned judge to mention this in his summing-up was a misdirection. The second accused's defence was that at the time of the stabbing he was elsewhere in a taxi and he called the taxi driver, Mat bin Darus, to corroborate him. Dato' Jeyaratnam complained that nothing was said of his independence and of the fact that he was unshaken in cross-examination, by the learned trial judge in his summing-up. In our judgment it is no misdirection not to tell the jury everything which might have been told and non-direction merely is not misdirection. We are in the region of facts. The failure of the learned judge to refer in his summing-up to these matters has not caused a misdescription of the whole bearing of the evidence. Here again the jury were entitled to rely completely on the impression made on them in court by the oral testimony of witnesses whom they saw and heard.

Finally Dato' Jeyaratnam submitted that the case for the defence had not been put to the jury in a way to ensure the true evaluation of the appellants' evidence We think that, on the contrary, all the main points in the evidence had been carefully and fairly placed before the jury and that therefore this appeal should be dismissed and the conviction upheld and sentence affirmed.

Appeal dismissed.

Solicitors: *Cheang Lee & Ong.*

FOONG NAN v. SAGADEVAN

[F.C. (Ong C.J. (Malaya), Suffian and Gill F.JJ.) April 1, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 77 of 1970]

Negligence — Contributory negligence — Foreseeability — Avoiding action — Finding of fact by judge — Appeal — Damages — Interest — Affirmed on appeal.

In this case the learned judge had held that the appellant was solely responsible for a collision between a Fiat motor car driven by him and a Honda motor-cycle driven by the respondent. He found that the accident occurred while the motor car was overtaking some cyclists and while doing so it went to the wrong side of the road. He awarded damages and interest in respect of the damages.

Held (Ong C.J. (Malaya) dissenting): (1) the learned trial judge was justified on the facts in concluding that the accident occurred as a result of the defendant's negligence alone;

(2) the learned judge was right in awarding damages and interest in this case.

Cases referred to:-

(1) *Dorrington* v. *Griff Fender (Swansea) Ltd.* [1953] 1 W.L.R. 690, 695.

(2) *Jones* v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608, 615.

(3) *Kerry* v. *Carter* [1969] 1 W.L.R. 1372, 1376.

(4) *Jefford* v. *Gee* [1970] 2 W.L.R. 702.

FEDERAL COURT.

N. T. Rajah (*Y. C. Chin* with him) for the appellant.

M. Sivalingam for the respondent.

Ong C.J. (Malaya): This is an appeal against the decision of Pawan Ahmad J. given in the High Court at Ipoh holding the appellant solely responsible for a collision between a Fiat motor-car driven by him and a Honda 90 motor-cycle driven by the respondent, who consequently was awarded heavy damages.

The accident occurred on a straight stretch of road between Jelapang and Ipoh during a heavy drizzle at about 8.40 p.m. on March 18, 1966. The road was 17 feet 9 inches wide, lighted by street lamps, and the vehicles were travelling in opposite directions. The respondent, plaintiff in the action, stated that he was riding about 3 feet from the left edge of the road before the collision and was the same distance from the roadside when he was knocked down. He alleged that the accident was due to the Fiat crossing over to its wrong side while overtaking two cyclists who were riding abreast behind another pair. The appellant, however, denied that there were any cyclists or other vehicles on the road. He said he dipped his headlights several times on seeing the motor-cycle some 250 yards away because it was coming towards him along the crown of the road. On approaching close to each other he was dazzled by the motor-cycle headlight and so he kept about 2 feet from his side of the road but did not pull up for fear of a skid on the wet surface. The motor-cycle then ran into his car.

From the evidence of the parties themselves as to their respective positions on the road, it is manifest that, if both were to be believed, no collision could possibly have occurred on a road of that width. Hence one or the other was not telling the truth, if not both. The plaintiff's evidence, however, was supported by an independent witness, Gangatharan, who said he was one of the cyclists being overtaken by the Fiat when the accident took place. The learned judge accordingly came to the following conclusion:—

"In my opinion the plaintiff was telling the truth *because* his version was consistent with the positions of the vehicles found *after* the collision as seen in the sketch plan and in the photographs in exhibit 'A'. From the sketch plan and the photographs it was very clear that the motor car was on the wrong side of the road and the motor cycle was on the correct side of the road after the accident. *From these circumstances* I drew the inference that the collision was caused solely by the negligence of the defendant because he negligently overtook the cyclists ahead of him and thereby got on to the wrong side of the road when there was an on-coming motor cycle and by reason of his sole negligence there was a collision between his motor car and the on-coming motor cycle. I therefore found as a fact that the collision was solely due to the negligence of the defendant."

I regret to say that I do not think such a conclusion sustainable for the reasons given. In my view the position of the vehicles after the accident can afford absolutely no clue, in this case, to their respective positions on the road immediately before or at the moment of collision. The vehicles could not have instantly stopped dead upon impact, but the heavier vehicle must by its greater momentum have pushed the lighter one backwards. This is borne out by the plan and photographs showing that the motor-cycle was facing the direction from which it came The windscreen of the car having been shattered by the respondent's body the fragments thereof falling on the bonnet must have been carried forward some distance before they dropped on the road upon the vehicle coming to a standstill. For these reasons the learned judge's conclusion is clearly seen to have been drawn from wrong premises, for nothing shown in the sketch plan or photographs tells precisely where the collision took place — all that can be said for certain is that it must have been some distance behind where the Fiat came to rest.

In the circumstances the learned judge should have considered the evidence of the independent witness, whom he believed. Gangatharan had stated positively that "the collision took place more or less in the centre of the road". It was not necessary for the defence to impeach his testimony for, in earlier proceedings in the magistrate's court — when the appellant was charged for a driving offence — this same witness had said both in examination-in-chief and cross-examination: "the accident took place ahead of me in the centre of the road". This was a statement of fact made by the plaintiff's own witness and since the plan and photographs were of neutral value, it should have been the determining factor on the issue of the respective parties' share of liability. Unfortunately the learned judge thought nothing of it and nowhere in his judgment was any reference made to this vital piece of evidence.

His finding of fact, that there were cyclists on the road, must of course be accepted by this court. Had the appellant pulled up behind them until the respondent was safely on his way, no accident could have happened. The judge was accordingly justified in finding the appellant's failure to stop being the effective cause of the collision. Even had the respondent refused to give way, but continued along the crown of the road as before, the appellant was not justified in risking a collision. Blame for the accident, therefore, must be attached to him. But was he entirely to blame? Since the passing of the Civil Law Ordinance 1956, the courts have had, at all times, to consider in what degree each, *vis-a-vis* the other, was at fault. Because the learned trial judge disbelieved the appellant he seemed to have drawn the inference that the appellant was exclusively to blame. To quote the words of Birkett L.J. in a comparable case, *Dorrington* v. *Griff Fender (Swansea) Ltd.*:-[1]

"... a vital question for the county court judge was, not whether there was any chance to avoid the plaintiff, but whether it was negligent of the driver for the lorry to be there at all. Reading judge Thomas' judgment, I am bound to say that the conclusion seems irresistible that he did not consider that matter at all. I quite agree with Mr. Griffith that was raised in cross-examination, but when the judge came to give his judgment he had this one point, it would appear, in mind: when the plaintiff emerged, the defendants' lorry driver had no chance to avoid him. I think there was the prior question to which he ought to have addressed his mind... But I think that the effect of this judgment is that the judge omitted to give consideration and attention to what, I think, was a vital part of the case."

In the instant case, it was the respondent's own witness who stated categorically that the collision took place "more or less in the centre of the road". On a road 3 inches short of 18 feet, the middle of the road is practically 9 feet from each side. If the respon-

dent was, as he claimed, only 3 feet from the edge of the road, I think he was sufficiently contradicted by his own witness. Seven feet, or even six, from the side might perhaps be said to be close enough to the middle of the road, but hardly 3 feet. In my view, the respondent should still have had enough room to pass in safety, although the offside of the car was as much as 10 or 12 feet from its own side of the road while overtaking the cyclists — had the respondent only taken sufficient care of his own safety. Nowhere was there any evidence by the respondent of his taking any evasive action from the first sighting of the approaching car till the collision. With all respect, I think the judgment in this case took no notice of this vital fact. It is vital in that the respondent's own "share in the responsibility" for the accident should have been taken into account. Contributory negligence means the failure by a person to use reasonable care for the safety of himself, contributing, by his want of care, to his own injury.

Once it is accepted, as I think it must, that the collision took place in or about the middle of the road, it follows that the presence of the cyclists did not cause the appellant to cross over to his wrong side to the extent that the respondent's passage was blocked. Left no more room than 5 or 6 feet of open road any motor-cycle should still have been able to pass in safety. On the straight stretch of road where this accident occurred both drivers must from afar have seen the approach of each other, as well as make allowance for the presence of the cyclists in between. As Denning L.J. said in *Jones* v. *Livox Quarries Ltd.*:-[2]

"Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences. The consequences do not depend on foreseeability, but on causation. The question in every case is: What faults were there which caused the damage? Was his fault one of them?".

In my view, while the greater share of blame attached to the appellant, the respondent was partly responsible for his own misfortune. In the circumstances I would apportion the appellant's share of blame as 75 per cent. and the respondent 25 per cent. I have thus apportioned damages although the trial judge held the appellant solely liable. I do so on the grounds thus stated by the Master of the Rolls in *Kerry* v. *Carter*:-[3]

"This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly."

The appellant further appeals against the award of interest, at the rate of 3 per cent. per annum in respect of the special damages, agreed at $1,390 from the date of the accident till judgment and the rate of 6 per cent. per annum from the date of service of the writ until judgment in respect of the portion of general damages awarded for pain and suffering and loss of amenities, amounting to $23,000. Interest was not awarded on the sum of $17,000 representing loss of future earnings. The learned judge had followed the recommendations made by Lord Denning in *Jefford* v. *Gee*[4] and since this court has already allowed interest in other cases on the principles so stated, I would dismiss this part of the appeal.

Suffian F.J.: There was a road accident in which the plaintiff (respondent), a motor cyclist, suffered injury when he collided with an oncoming car driven by the defendant. The learned judge held that the defendant (appellant) was wholly to blame and awarded the plaintiff damages as follows:

(a) $1,390 special damages; and

(b) $40,000 for general damages.

He also ordered the defendant to pay interest at 3% on the special damages from the date of accident to the date of trial and interest at 6% on the general damages from the date the writ was served.

The defendant appeals. He argues that on the evidence the learned trial judge should have held that the plaintiff was wholly to blame for the accident or alternatively that he was partly to blame. He further argues that the learned judge was wrong in ordering interest to be paid.

As regards liability, the learned trial judge had first to decide whether or not there were cyclists on the road at the time of the accident. The plaintiff said that there were and gave evidence to that effect; he also called one of the alleged cyclists, P.W. 2, to corroborate him. The defendant's evidence flatly contradicted this evidence. Apart from this oral testimony there was no evidence of any kind on this point. The learned trial judge who saw and heard the witnesses and was in a better position than me to weigh the credibility of the two conflicting versions, saw fit to find that there were cyclists on the road at the time of the accident, and I do not think that it would be right for us to interfere with that finding.

The learned judge had then to decide whether or not the plaintiff's version of the accident was to be preferred to that of the defendant.

The plaintiff said that on the night in question (18th March, 1966) it was drizzling and at about 8.40 p.m. he was riding his motor cycle on a straight road from Jelapang to his house in Ipoh. He was riding about 3 feet from the left edge of the road. A car came from the opposite direction with its headlight on but dipped. There were two cyclists in front of this car, and another cyclist immediately behind the two cyclists, all proceeding towards him. The car

overtook the first cyclist immediately in front of it, cut into the road to the plaintiff's side and collided with the plaintiff's motor cycle which was on its correct side of the road. As a result the plaintiff fell on the grass verge on the left-hand side of the road and became unconscious.

One of the cyclists, P.W. 2, said that in fact there were four of them, cycling abreast in pairs. Jag Jit Singh and Sundra Segram were cycling ahead and P.W. 2 himself was cycling behind with another Sikh. This Sikh was close to the edge of the road and P.W. 2 was on his right. The defendant's car overtook P.W. 2 and collided with the plaintiff's motor cycle. P.W. 2 admitted that he had known the motor cyclist a few months before the accident and did not make a statement to the police until about 6 months after the accident at the plaintiff's request.

For his part the defendant said that he was travelling on his correct side of the road when he saw the headlight of an oncoming motor cycle. He dipped and undipped his headlights for about four times because the motor cyclist was travelling on the crown of the road. The motor cycle headlight affected his vision and he could see for a distance of 8 to 10 yards only. His car was about 2 feet from the left edge of the road. The motor cycle then knocked into his car when he was on his correct side of the road. As already stated, he denied the presence of cyclists at the scene of the accident.

Of this conflicting evidence, the learned judge preferred that of the plaintiff and his witness to that of the defendant. But unlike the evidence relating to the presence or otherwise of cyclists at the scene of the accident which was purely oral, the evidence relating to the question whether or not the accident had been caused by the defendant driver overtaking a cyclist and thereby running into the path of the oncoming motor cyclist, was supplemented by independent evidence in the form of a sketch drawn by Sgt. A. Samad and four photographs taken by the police, all of the scene soon after the accident. Mr. Rajah argues that, tested against this independent evidence, the learned judge's finding cannot be supported and should be reversed. It is said that most of the broken glass deposited by the defendant's car onto the road was on the defendant's side of the road, and that this shows that probably the point of impact did occur on the defendant's side of the road or on the crown of the road as admitted by P.W. 2. In my judgment, this independent testimony was inconclusive and so no reliance could be placed on it either way. The sketch and the photographs only showed the position of the two vehicles after the accident. We have no means of being sure of the point of impact as there were no brake or skid marks, but we can be sure that neither vehicle became rooted to the spot immediately on impact and that the car being heavier must after impact have pushed the motor cycle some feet back. As regards the broken glass on the road, the first photograph shows that it was evenly distributed on both sides of the centre line. Though the learned judge referred to the sketch and photographs, he must I think have been influenced more by the oral evidence produced by the two adversaries. The plaintiff said that the defendant overtook the cyclists and thus collided with the plaintiff. His witness said that the collision took place immediately after the defendant's car had overtaken him. The learned judge referred to this evidence in his grounds, and I think that he must have considered the admission by the plaintiff's witness in cross-examination that the collision took place "more or less in the centre of the road" (not, be it noted, "in the centre of the road") more than outweighed by this evidence, and so not meriting mention in his judgment. With respect, therefore, I think that the learned judge was justified in concluding that the accident occurred as a result of the defendant's negligence alone. On seeing the cyclists ahead of him, he should have either slowed down or waited to let the plaintiff through first: instead, feeling safe in his steel car, he decided nevertheless to overtake them, regardless of the consequences to the plaintiff. I would therefore dismiss this appeal as to liability.

As regards the appeal on interest, with respect I think that the learned judge was right there too.

For my part, therefore, I would dismiss this appeal with costs.

Gill F.J.: I agree with my brother Suffian that this appeal should be dismissed with costs.

The learned trial judge found as a fact that the collision was solely due to the negligence of the appellant. He made that finding on the evidence of the respondent and his witness, which evidence he preferred to that of the appellant. The collision took place as a result of and immediately after the act of the appellant in overtaking two cyclists riding abreast, so that the respondent had no chance to take any avoiding action. In the circumstances, the absence of any avoiding action on the part of the respondent cannot be held to be blameworthy.

Appeal dismissed.

Solicitors: *Yeap & Yeap; Lim Cheng Ean & Co.*

SHARIKAT LEE HENG SDN. BHD. v. PORT SWETTENHAM AUTHORITY

[F.C. (Ong C.J. (Malaya), Suffian and Gill F.JJ.) April 1, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 110 of 1970]

Port Authority — Bailment — Liability as bailee — Port Swettenham Authority By-laws, 1965, r.91.(1).

Bailment — Port authority — Goods in custody — Liability for loss — Res ipsa loquitur — Burden of proof — Port Swettenham Authority By-laws, 1965, r.91(1).

Contract — Port authority — Contra proferentem rule — Application of — Effect of — Port Swettenham Authority By-laws, 1965, r.9(1).